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Supreme Court, U.S.
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No. 93-6188

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ROY HECK,
Petitioner,

v.

JAMES HUMPHREY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 29, 1993
CERTIORARI GRANTED JANUARY 14, 1994

85pp

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
December 27, 1988	§ 1983 Complaint filed
February 1, 1989	Opinion and Judgment of the United States District Court for the Southern District of Indiana Dismissing § 1983 Action filed
April 6, 1990	Opinion of the Supreme Court of Indiana Affirming Petitioner's Conviction filed
June 19, 1990	First Habeas Corpus Petition in the United States District Court for the Northern District of Indiana filed
January 7, 1991	Order of the United States District Court for the Northern District of Indiana Dismissing First Habeas Corpus Petition filed
January 22, 1991	Second Habeas Corpus Petition in the United States District Court for the Northern District of Indiana filed
July 31, 1991	Opinion and Judgment of the United States District Court for the Northern District of Indiana Denying Second Ha- Corpus Petition filed
September 18, 1992	Order and Judgment of the United States Court of Appeals for the Seventh Circuit Affirming Dismissal of Second Habeas Petition filed
July 1, 1993	Opinion of the United States Court of Appeals for the Seventh Circuit Affirming Dismissal of § 1983 Action filed
November 3, 1993	Order of the United States District Court for the Southern District of Indiana Granting In Forma Pauperis Status and Ordering Clerk to File Second § 1983 Complaint filed
November 8, 1993	Second § 1983 Complaint filed

Form to be used by persons in filing a complaint pro se under the Civil Rights Act, 42 USC 1983

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

Civil No. ———

ROY HECK,
Plaintiff

v.

JAMES HUMPHREY, DEARBORN COUNTY PROSECUTOR; ROBERT EWBANK, ATTRONEY; and MICHEAL KRINOPH, INDIANA STATE POLICE INVESTIGATOR; ALL IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES AS SUCH,
Defendants

COMPLAINT

A. Have you begun other actions in state or federal court dealing with the same facts involved in this action or otherwise relating to your claim?

YES ( ) NO (X)

B. If your answer to A is yes, describe the action in the space below. (If there is more than one action, describe the additional actions on the reverse side of this page).

1. Parties to the Action: ———
2. Court (if federal court, name the district; if state court name the county):
3. Docket number: ———

4. Name of judge who heard case: ———
5. Disposition (For example, was the case dismissed? Was it appealed? Is it still pending?)

If you are imprisoned in a state penal institution, then answer C: 1, 2 and 3:

C. 1. Did you present this complaint to the state prison grievance procedure?

YES ( ) NO (X)

2. If your answer is yes, what was the result?

3. If your answer is no, please explain.

THIS IS NOT A PRISON MATTER

PARTIES

(Place your full name in the first blank in paragraph 1. In the second blank, place your present address. Do the same for additional plaintiffs, if any).

1. The plaintiff is ROY HECK #874376, WESTVILLE CORRECTIONAL CENTER, WESTVILLE, INDIANA 46391
2. Plaintiff's address (and prison number) is: SEE ABOVE

CAUSE OF ACTION

D. I allege that the following of my constitutional rights, privileges or immunities have been violated:

Allegation 1: DEFENDANTS JAMES HUMPHREY, ROBERT EWBANK, AND MICHAEL KRINOPH, ACTING UNDER COLOR OF STATE LAW, CONSPIRED AND/OR ACTED IN CON-

CERT WITH A MEETING OF THE MIND TO SUBJECT PLAINTIFF HECK TO AN ILLEGAL INVESTIGATION IN VIOLATION OF THE FOURTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION, AND 42 U.S.C. 1983, 1985(2), 1986, 2: AND 1988.

E. The following facts form the basis for allegations listed above in D. (Include all of the facts you consider important, and state them clearly and in your own words—but do NOT make legal arguments or citations).

Allegation 1:

"SEE ATTACHED SHEET FOR FACTS IN SUPPORT"

Allegation 2:

Allegation 3:

(If you need more space to explain any allegation or to list additional facts, use the other side of this sheet, or attach an additional sheet.)

REQUEST FOR RELIEF

1. I DO request that I be allowed to commence this action without prepayment of fees and costs, or security therefore, pursuant to 28 U.S.C. 1915. The affidavit of indigency below has been completed and is submitted in support of this request for leave to proceed in forma pauperis.

SUPPORTING FACTS TO MY ALLEGATION AGAINST DEFENDANTS JAMES HUMPHREY, ROBERT EWBANK, AND MICHAEL KRINOPH.

BETWEEN MAY AND JULY, 1987:

1. DEFENDANTS HUMPHREY, EWBANK, AND KRINOPH, AFTER CONDUCTING A SEARCH IN 1986 OF MY DECEASED WIFE'S TRAILOR HOME, TOOK ITEMS FROM HER RELATIVES AND USED THEM IN THEIR UNLAWFUL, UNREASONABLE, AND ARBITRARY INVESTIGATION OF ME BECAUSE THEY, TOGETHER THROUGH AGREEMENT, UNDERSTANDING, AND CONTROL BELIEVED ME TO BE RESPONSIBLE FOR HER DEATH.

2. THEY ALSO ARBITRARILY, UNLAWFULLY, UNREASONABLY AND KNOWINGLY DESTROYED CLOTHING FROM MY DECEASED WIFE'S BODY WHICH WAS EXCULPATORY IN NATURE AND COULD HAVE PROVED MY INNOCENCE OF THIS CRIME.

3. THESE NAMED DEFENDANTS DIRECTED IN CONCERT WITH A MUTUAL UNDERSTANDING AND AGREEMENT AN ILLEGAL AND UNLAWFUL VIOCE IDENTIFICATION PROCEDURE (3) TIMES WITH A POTENTIAL STATE WITNESS, WITHOUT MY OR MY ATTORNEY'S PRESENCE TO FURTHER THE OBJECTIVES OF SAID CONSPIRACY AGAINST ME.

4. ALL OF THE DEFENDANTS ACTIONS WERE PRELIMINARY POLICE INVESTIGATIVE ACTIVITY TO GATHER EVIDENCE ILLEGALLY AND BY ANY MEANS NECESSARY TO CHARGE ME WITH THE CRIME OF KILLING MY WIFE.

5. AT ALL TIMES DURING THIS UNLAWFUL, UNREASONABLE, AND ARBITRARY INVESTIGATION THE DEFENDANTS KNEW PLAINTIFF HAD CLEARLY ESTABLISHED U.S. CONSTITUTIONAL AND STATUTORY RIGHTS TO BE FREE FROM THIS TYPE OF ILLEGAL CONDUCT BY PUBLIC OFFICIALS YET THEY OVERRIDED THEM IN CONCERT.

6. BOTH THE DEFENDANTS HUMPHREY AND EWBANK, EVEN THOUGH COUNTY PROSECUTORS AT SAID TIME, WERE ACTING AS "POLICE INVESTIGATORS", AND NOT FUNCTIONING IN THEIR QUASI-JUDICIAL CAPACITIES AGAINST THE PLAINTIFF.

7. ALL OF THE NAMED DEFENDANTS HAD PRIOR KNOWLEDGE OF THE WRONGS CONSPIRED TO BE DONE AGAINST THE PLAINTIFF, AND HAVING POWER TO PREVENT OR AID IN THE PREVENTING THE COMMISSION OF SAME, NEGLECTED OR REFUSED TO DO ANYTHING TO PREVENT THE PLAINTIFF'S CIVIL RIGHTS FROM BEING VIOLATED.

2. I believe that I am entitled to the following relief:

SEE ATTACHED COPY

/s/ Roy Heck #874376
(Signature)
P.O. Box 473
Westville, Ind. 46391
(Address)

PLAINTIFF BELIEVES HE IS ENTITLED TO THE FOLLOWING RELIEF:

A) A DECLARATORY JUDGEMENT PURUANT TO 28 U.S.C.A. 2201-2202, DECLARING WHETHER OR NOT DEFENDANTS VIOLATED PLAINTIFF'S CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS NOT TO BE SUBJECT TO AN ILLEGAL CRIMINAL INVESTIGATION.

B) COMPENSATION IN THE AMOUNT OF $300,-000.00, FROM EACH NAMED DEFENDANT FOR VIOLATING PLAINTIFF'S CIVIL RIGHTS AND HIS LOSSES INCURED FROM HIS EMPLYMENT AND FARM OPERATIONS.

C) PUNITIVE DAMAGES IN THE AMOUNT OF #300,000.00 FROM EACH NAMED DEFENDANT FOR VIOLATING PLAINTIFF'S CIVIL RIGHTS.

D) INTEREST AND COSTS INCURRED IN LITIGATING THIS ACTION IF PLAINTIFF SHOULD PREVAIL ON ANY OF HIS CLAIMS.

E) ATTORNEY FEES AWARD IF PLAINTIFF PREVAILS ON ANY OF HIS CLAIMS.

AFFIDAVIT

STATE OF INDIANA)
) ss:
COUNTY OF LAPORTE)

Before me the undersigned in and for the said county and state presently appeared ROY HECK, plaintiff in the within action who, being first duly sworn according to law, deposes and says that the facts set forth in the foregoing complaint are true of his own knowledge, except as to those matters that are stated in it on his information and belief, and as to those matters he believes them to be true:

/s/ Roy Heck #874376
(Signature of affiant-plaintiff)

SUBSCRIBED AND SWORN TO BEFORE ME, THIS 21 DAY OF DECEMBER, 1988.

/s/ Robert J. Budak
Notary Public or other person authorized
by law to administer oaths.

(Notary Stamp Omitted in Printing)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

Docket No. NH 88-209-C

ROY HECK

v.

JAMES HUMPHREY, *et al.*

APPLICATION TO PROCEED IN FORMA PAUPERIS, SUPPORTING DOCUMENTATION & ORDER

I, ROY HECK, declare that I am the (*check appropriate box*)

☒ petitioner/plaintiff

☐ respondent/defendant

☐ movant (filing 28 U.S.C. 2255 motion)

☐ _____
other

in the above-entitled proceeding; that, in support of my request to proceed without being required to prepay fees, cost or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or give security therefor; that I believe I am entitled to relief. The nature of my action, defense, or other proceeding or the issues I intend to present on appeal are briefly stated as follows: 42 U.S.C. 1983, 1985(2) 1986, 1988, ACTION FOR DEPRIVATION OF MY FOURTH AND FOURTEENTH AMENDMENT RIGHTS TO BE FREE FROM AN ILLEGAL INVESTIGATION AND DUE PROCESS.

In further support of this application, I answer the following questions.

1. Are you presently employed?

   Yes ☐ No ☒

   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer, (list both gross and net salary)

   INCARSERATED INMATE/$13.00/MONTH

   b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.

   AUGUST 12, 1986

   $800.00/MONTH

2. Have you received within the past twelve months any money from any of the following sources?

   a. Business, profession or other form of self employment — Yes ☐ No ☒

   b. Rent payments, interest or dividends? — Yes ☐ No ☒

   c. Pensions, annuities or life insurance payments? — Yes ☐ No ☒

   d. Gifts or inheritances? — Yes ☐ No ☒

   e. Any other sources? — Yes ☐ No ☒

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.

3. Do you own any cash, or do you have money in checking or savings account?

   Yes ☐ No ☒

   (Include any funds in prison accounts.)

   If the answer is "yes," state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

   Yes ☐ No ☒

   If the answer is "yes," describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

   NONE

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 12/16/88 (Date)

/s/ Roy Heck #874376
Signature of Applicant

CERTIFICATE
(Prisoner Accounts Only)

I certify that the applicant herein has the sum of $29.16 on account to his credit at the _____ institution where he is confined. I further certify that the applicant likewise has the following securities to his credit according to the records of said institution _____

_____

_____

/s/ Ofc. Budak
Authorized Officer of Institution

ORDER OF COURT

The application is hereby denied

_____ _____

United States Judge Date

The application is hereby granted. Let the applicant proceed without prepayment of cost or fees or the necessity of giving security therefor.

_____ _____

United States Judge or Magistrate Date

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

Cause No. NA 88-209-C

ROY HECK,

Plaintiff,

v.

JAMES HUMPHREY, Dearborn County Prosecutor, ROBERT EWBANK, Attorney, MICHAEL KRINOPH, Indiana State Police Investigator; All in their Official and Individual Capacities,

Defendants.

ENTRY

This cause is before the Court on the complaint of Roy Heck and on his Application to Proceed *in forma pauperis*. The Court, having read and examined such Application and the complaint, and being duly advised, now makes its ruling.

Plaintiff Roy Heck is confined at the Westville Correctional Center. He brings this action against James Humphrey and Robert Ewbank, identified as Dearborn County prosecutors at the time relevant to the complaint, and against Michael Krinoph, an investigator with the Indiana State Police. He alleges that the defendants acted improperly in an investigation culminating in his being charged with killing his wife.

Although it is highly doubtful that the plaintiff's claim contains any merit whatsoever, it is plain that the issue he raises directly implicate the legality of his confinement. The exclusive means by which he may do this in federal court is through an action for habeas corpus relief, which in turn may be brought only after available

state remedies have been exhausted. *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973); *Hanson v. Heckel*, 791 F.2d 93 (7th Cir. 1986); *Taylor v. Kavanagh*, 640 F.2d 450, 451 (2nd Cir. 1981); *Waste Management of Wisconsin, Inc. v. Fokakis*, 614 F.2d 138, 142 (7th Cir. 1980); *Hanson v. Circuit Court of the First Judicial Circuit of Illinois*, 591 F.2d 404 (7th Cir.), *cert. denied* 444 U.S. 907 (1979).

The Supreme Court has criticized "the continued illogic of treating federal habeas and § 1983 actions as fungible remedies for constitutional violations." *Allen v. McCurry*, 449 U.S. 90, 105n.24 (1980). Recent decisions from our Court of Appeals indicate that in some circumstances a court should refrain from entertaining a civil rights action where a decision on the merits of the claim presented would be tantamount to determining the legality of a plaintiff's confinement until such plaintiff has fully exhausted his state remedies challenging such confinement. *Crump v. Lane*, 807 F.2d 1394 (7th Cir. 1986); *Hanson v. Heckel*, 791 F.2d 93 (7th Cir. 1986). That is the situation here, and for the present the broad, general terms of section 1983 must yield to the exclusiveness of the remedy of habeas corpus in federal court. *Hanson v. Heckel*, 791 F.2d 93 (7th Cir. 1986).[1] Accordingly, the plaintiff's request to proceed *in forma pauperis* must be denied and the action dismissed without prejudice.

IT IS SO ORDERED this 1st day of February 1989.

/s/ James E. Noland
JAMES E. NOLAND, Judge
United States District Court

[1] Because the plaintiff has not alleged and the Court could not establish that he has completed the appellate process in Indiana, construing the present complaint as a habeas corpus petition would also result in dismissal without prejudice for failure to satisfy the exhaustion requirement of the federal habeas statute.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

(Title Omitted in Printing)

JUDGMENT

This cause is before the Court on the complaint of Roy Heck and on his Application to Proceed *in Forma Pauperis*.

Whereupon the Court, having read and examined such Application and complaint, and having this day made its Entry,

IT IS NOW ORDERED, ADJUDGED AND DECREED that the plaintiff's Application to Proceed *in Forma Pauperis* is DENIED, that the plaintiff take nothing by his complaint and this cause of action is DISMISSED WITHOUT PREJUDICE.

/s/ James E. Noland
JAMES E. NOLAND, Judge
United States District Court

Date: Feb. 1, 1989

SUPREME COURT OF INDIANA

No. 15S00-8711-CR-1081

ROY HECK, SR.,
Appellant,
v.
STATE OF INDIANA,
Appellee.

April 6, 1990

GIVAN, Justice.

A jury trial resulted in the conviction of appellant of Voluntary Manslaughter, for which he received a sentence of fifteen (15) years.

The facts are: The appellant, Roy Heck, Sr., and the decedent, Rickie Heck, were husband and wife. In August of 1985, Rickie started dissolution proceedings against appellant. Sometime between January 5 and 6, 1986, while the dissolution proceedings were pending, the decedent disappeared.

In late October of 1986, her decomposed remains were found buried on appellant's farm. Dr. Lee Lehman, a pathologist, testified that he performed an autopsy on the remains of the decedent in October of 1986, but because of the advanced decomposition of the remains, he found no demonstrative cause of death. However, after further consideration, the pathologist's report was changed, and because of a broken jaw, which he believed had been inflicted near the time of death, he theorized the probability was that the decedent had died as a result of a severe blow to the head.

Near midnight on January 6, 1986, a number of witnesses in the vicinity of the trailer in which the decedent lived heard an argument between the decedent and another person. Some of these people did not see the other person, while others stated that they saw the decedent arguing with a tall young man. One of these witnesses, Tessie Standriff, stated that her trailer was near the decedent's trailer and that she heard the argument and could identify appellant as the person arguing with the decedent. She stated that she could not identify him by his face but could identify him by his voice.

At trial, she testified that appellant told the victim she was coming home because she was his wife. However, during a pretrial deposition, she had indicated she had not heard such a statement. The evidence shows that Mrs. Standriff was Philippine and had a limited use and understanding of the English language.

Some of the witnesses testified they heard screaming and gunshots that night. Following the decedent's disappearance, appellant told various relatives that she had told him she was taking a trip to Florida. When Roy Heck, Jr. went with appellant to the decedent's trailer, he noticed food still on the stove. He also noticed the trailer was messed up, which was unusual for his mother. The following day, Junior observed one of his mother's suitcases in appellant's home.

A few weeks before the victim's disappearance, appellant had beaten her and was scheduled to go to trial on charges stemming from that incident the week the victim disappeared. When he failed to appear in court, he was arrested. While in jail, he was visited by his daughter, Roberta, and his girlfriend, Shirley Slaughter. He asked them to sprinkle pepper over the site of a sinkhole on his farm (this is the location where the body eventually was found). He also asked them to remove the victim's possessions from his home, including spare purses and a

suitcase, before the police searched the house. The women complied with the request the next day. The suitcase contained items of female apparel. The purse contained the victim's drivers license, social security card, make-up, and other such items.

Appellant also requested that the two women telephone the police pretending to be the victim. Shirley attempted to comply with appellant's request. Appellant later told Roberta to keep quiet about her mother's purse and drivers license.

Robert Cuneo testified that he and his father were in the roof repair business and that in times past appellant had permitted them to dump old shingles on his farm. Shortly after the victim's disappearance, appellant contacted the elder Cuneo and asked him to dump some old shingles in the area where the victim's body later was found. He told Cuneo that he wanted the shingles dumped there to cover up the smell of some soured corn. Robert Cuneo testified that the area appeared to have been recently dug out and smoothed over.

In March of 1986, Roberta was in Florida with Eleanor Slaughter, Shirley's mother-in-law, and Shirley's daughter, Shawn Theis. She observed that Eleanor had the victim's ring in her possession with other jewelry to be sold. Eleanor told her that appellant had given her the ring to sell. Appellant later claimed that he had obtained the ring when the victim threw it at him during an argument.

In October of 1986, appellant was served with a warrant to search his farm and in particular the sinkhole site where the victim's remains later were found. Shortly after the warrant was served, appellant left and went to Tennessee. However, he returned shortly and turned himself in to the police.

Appellant claims the evidence is insufficient to support his conviction and couples this with his claim that much

of the evidence submitted was inadmissible. Appellant contends the State's evidence fails to disclose the cause, means, manner, place, or time of the victim's death. It is true that none of these facts was established by direct evidence. However, a jury's verdict may be based solely upon circumstantial evidence. *Rowan v. State* (1982), Ind., 431 N.E.2d 805.

In the case at bar, there is ample evidence to support a finding that appellant had a history of battering his wife, including a criminal charge for which he was to go on trial near the time of her disappearance. There also was evidence that at the time of the victim's disappearance, appellant had stated falsely to others that his wife had gone on a trip. He also removed luggage and personal items from her trailer to his home, then instructed his girlfriend and his daughter to remove those items before police came to the house.

Further, appellant's conviction is supported by the fact that the victim's remains were found buried on appellant's farm, that he caused others to dump old shingles on the site of her burial, and that when police obtained a search warrant to search his farm he left the state. His flight was relevant although appellant did return to Indiana of his own volition and turn himself in to the police. The jury also was entitled to believe that a man fitting appellant's general description was heard engaged in a heated argument with the decedent at her trailer on the evening she disappeared.

Appellant claims the State failed to prove by any credible evidence the cause of the decedent's death. It is true that when the remains were first examined by the pathologist, he stated that due to the state of decomposition he could not state a cause of death. However, upon further consideration, he observed that the presence of a broken jaw, which had occurred at approximately the time of death, could indicate a blow to the head which might have been severe enough to have caused death.

This Court has held that the cause of death may be established by circumstantial evidence. *Patterson v. State* (1988), Ind., 532 N.E.2d 604. There is ample circumstantial evidence in this case to support the jury's determination that the victim had met a violent death at the hands of appellant.

Appellant attacks the testimony of State's witness Tessie Standriff, whose trailer was situated near the trailer of the victim. She testified that on the night of the victim's disappearance, she heard the victim having a heated argument with a tall man. She was unable to identify his face, but she said she recognized his voice as appellant's.

Appellant points out that during the investigation Standriff came to the police department and asked to hear the voice of appellant on a tape recorder. The police complied with her wish. She verified that the voice was the same voice she had heard on the night of the victim's disappearance. Appellant contends that this constituted an impermissibly suggestive identification of appellant's voice in that Standriff knew she was listening to the voice of appellant at the time she made the identification.

It is true that this Court has held that it is improperly suggestive for police to inform a lineup observer that the suspect is in the lineup. *Chambers v. State* (1981), Ind., 422 N.E.2d 1198; *Young v. State* (1979), 272 Ind. 1, 395 N.E.2d 772. However, this was not a lineup or voice identification instituted by the police officers.

Standriff suspected that the person she had seen and heard was the husband of the victim, and she came to police headquarters knowing that they had tape recordings of appellant's voice and she wanted to assure herhelf that she was correct in believing the person she had heard was in fact appellant. This certainly does not fall within the framework of a police-engineered lineup or voice identification.

Rather than a thing to be condemned, Standriff's action was a proper and conscientious thing to be condoned. She merely was striving to make sure she had not made an error in the voice identification. We see nothing in this episode to taint her in-court identification of appellant's voice and her statement that the voice was the same voice she had heard on the night of the victim's disappearance.

Appellant also contends that Mrs. Standriff's testimony should not be believed because during the early stages of the investigation she had stated that she had not heard the man state that the victim should come home with him because she was his wife. However, at trial she testified that such was the conversation she heard. This inconsistency was fully disclosed to the jury. It also was disclosed that Mrs. Standriff was from the Philippines and that she had a very limited understanding and use of the English language. The jury was entitled to determine whether this fact contributed to the apparent inconsistencies in Standriff's statements. *Bane v. State* (1981), Ind., 424 N.E.2d 1000.

Appellant claims the judgment is contrary to law due to the highly prejudicial and irrelevant hearsay testimony of certain of the State's witnesses. Twelve different witnesses testified concerning various incidents in which the decedent had displayed bruises and informed other persons that she had been beaten by appellant. In situations such as the case at bar, where the victim on several previous occasions has exhibited physical injuries and has notified observers that the injuries were inflicted by the defendant, such testimony, although hearsay, is admissible to show the defendant's state of mind at the time of those attacks and to demonstrate his motive and the likelihood that he was the perpetrator of the fatal attack upon the decedent. *Drummond v. State* (1984), Ind., 467 N.E.2d 742, citing *Romine v. State* (1983), Ind., 455 N.E.2d 911 and *Moore v. State* (1981), 275 Ind. 39, 414 N.E.2d 558.

Appellant attempts to distinguish this line of cases, stating that although he and the decedent had an ongoing relationship, there was no evidence that the deceased died in a manner similar to any of the prior assaults. Thus, he argues, the testimony in addition to being hearsay was irrelevant. We cannot agree with appellant in his evaluation of this evidence. The prior injuries to the victim were claimed by her to be the result of physical beatings from appellant. The evidence in this case, although wholly circumstantial, was that there was a high probability the victim died from a beating of such severe intensity that a broken jaw resulted. Rather than distinguishing the line of cases above cited, such evidence brings the case squarely within the rationale of those cases.

We see no error in the admission of the evidence of prior beatings suffered by the victim at the hands of the appellant.

Appellant claims the trial court erred when it allowed Robert Cuneo to testify what his father, Harry Cuneo, had told him regarding appellant's request that they dump shingles at a designated place on his farm. However, this comes under the *Patterson* exception to the hearsay rule that when the declarant is in court and testifies, his prior out-of-court statements may be put in evidence. *Patterson v. State* (1975), 263 Ind. 55, 324 N.E.2d 482. Appellant makes the same complaint against the testimony of Mary Cuneo. Her testimony was admissible for the same reason. *Id.*

Appellant also contends it was error to admit the testimony of Detective Michael Kreinhop concerning a telephone conversation he had with Donna Brady as to whether the victim had made a trip to Florida at the time of her disappearance. This testimony, however, was not placed in evidence for the purpose of the truth of whether the victim had gone to Florida but for the purpose of showing why the officer's investigation took the turn it

did. The evidence was admissible to show the reason for the officer's subsequent action. *Altmeyer v. State* (1988), Ind., 519 N.E.2d 138; *Boyd v. State* (1986), Ind., 494 N.E.2d 284, *cert. denied,* 479 U.S. 1046, 107 S.Ct. 910, 93 L.Ed.2d 860; *Stout v. State* (1985), Ind., 479 N.E. 2d 563.

Appellant claims even if this Court would hold that the testimony of the various individuals was admissible, the sheer number of witnesses who testified to extrajudicial statements rendered them so prejudicial as to require reversal. However, this Court has held that where individual items of evidence do not constitute reversible error, we will not reverse based upon the cumulative effect of that evidence. *See Stonebraker v. State* (1987), Ind., 505 N.E.2d 55; *Hudson v. State* (1986), Ind., 496 N.E.2d 1286. We see no reversible error in the admission of the above evidence.

Appellant contends the trial court erred in allowing the rebuttal testimony of Roberta Heck. On rebuttal, she testified that she had reported to appellant that she had been raped but that he told her not to report it—that he would "get him (rapist) in his own time." He further stated to her that he was "going to break his (rapist) legs or something." Appellant claims this irrelevant testimony was highly prejudicial to his case. The scope of rebuttal evidence is within the trial court's discretion. *Stewart v. State* (1988), Ind., 531 N.E.2d 1146. Evidence which explains, contradicts, or disproves the adversary's evidence may be competent rebuttal evidence. *Buchanan v. State* (1975), 263 Ind. 360, 332 N.E.2d 213.

In the case at bar, appellant attempted to intimate that someone else, such as his daughter Roberta, had been responsible for the death of the decedent. In pursuing this claim, he presented evidence attempting to show that the relationship between the decedent and Roberta had been turbulent. In his direct testimony, he claimed that

Roberta had been involved in an argument and a fight with a man named Luther Thompson, who, he claimed Roberta said, had raped her. He further stated that he had told Roberta to go to the police but that his wife had told her it was her own fault.

In raising such an issue, appellant opened the door for Roberta's rebuttal testimony to state her version of what had happened when she reported the rape to her parents. We see no error in the admission of Roberta's rebuttal testimony.

Appellant claims the court abused its discretion when, upon learning that the order for separation of witnesses had been violated, it allowed testimony from witnesses who had violated the separation order. Where there has been a violation of a separation order, the trial court, in the absence of connivance or collusion by the party calling the witness, may permit the witness to testify. *Cox v. State* (1981), 275 Ind. 636, 419 N.E.2d 737; *O'Conner v. State* (1980), 272 Ind. 460, 399 N.E.2d 364. The trial court's decision on such a matter will not be reversed absent an abuse of discretion. *Buchanan, supra.*

In the case at bar, appellant makes no claim that the prosecutor in any way connived to have the witnesses violate the separation order. In fact, the prosecutor observed that it was not known that these witnesses, after their initial testimony, would be recalled to the stand and that he only learned of such a necessity after appellant had presented unanticipated evidence which required the rebuttal testimony of the witness who had violated the order following their initial testimony. Under the circumstances, we see no reversible error in permitting these witnesses to testify.

Appellant contends the trial court erred in admitting State's Exhibits Nos. 2, 3, 101, and 105. Appellant acknowledges that the trial court has broad discretion in ruling on the admissibility of evidence and will be reversed only for a clear abuse of discretion. *Jackson v. State* (1986), Ind., 490 N.E.2d 1115. However, he claims that in the case at bar the questioned evidence was inadmissible because its prejudicial impact outweighed its probative value, citing *Rust v. Guinn* (1981), Ind.App., 429 N.E.2d 299. Exhibits 2 and 3 were taped interviews of appellant by the police. Neither tape included a confession. Appellant claims they thus were inadmissible because they were simply hearsay statements made by appellant and neither tape had any logical tendency to prove a material fact.

First, the State correctly observes that there is no hearsay problem in this issue because appellant testified at trial and was subject to examination on the evidence. *See Washburn v. State* (1986), Ind., 499 N.E.2d 264. As to the relevancy of his statements, appellant had filed an alibi notice in which he claimed to have been at the home of his son at the time the murder was believed to have taken place. The statements appellant made in these interviews concerned his whereabouts on the night of the homicide. Evidence is relevant if it tends to prove or disprove any material fact. *See Mengon v. State* (1987), Ind., 505 N.E.2d 788. Under the circumstances, we see no error in admitting State's Exhibits Nos. 2 and 3 into evidence.

State's Exhibit No. 101 is a certified copy of a petition for dissolution of the marriage between appellant and the victim. Appellant claims the State introduced the petition for the sole purpose of having the jury see that a restraining order against him was issued from the divorce court. He claims that such evidence is clearly inadmissible because its prejudicial impact outweighs its probative value, citing *Rust, supra.* Appellant claims, without citing authority, that to place before the jury the fact that a restraining order had been issued is improper. However, in the case at bar, there was an abundance of other evidence of prior abuse of appellant against the victim.

Even if we would assume *arguendo* that appellant's contention is correct and that a restraining order should not be placed before the jury, in the case at bar such evidence was merely cumulative and to only a minuscule degree. The evidence of the victim's prior abuse was overwhelming and the addition of the fact that a divorce court had issued a restraining order hardly could be expected to have any significant impact upon the decision of the jury. We see no reversible error in the admission of State's Exhibit No. 101.

State's Exhibit No. 105 is a request for an initial hearing stating that appellant was arrested on a bench warrant on a battery charge which was not the subject matter of the case at bar. Again, there was admissible independent evidence that appellant was to come to trial on a charge of assaulting the victim and that he was to appear in court shortly after the time the victim disappeared. The fact that State's Exhibit 105 concerned that charge was merely repetitious of what the jury already had before it.

During cross-examination of Detective Kreinhop, appellant questioned him as to how many charges had been filed and questioned the delay in filing the charges. The State's presentation of its Exhibit 105 was a response by the prosecutor to explain the delay in filing the instant charge. It was entirely proper for the State to present evidence to explain the questions raised by the cross-examination of Detective Kreinhop. *Starks v. State* (1987), Ind., 517 N.E.2d 46; *Kalady v. State* (1984), Ind., 462 N.E.2d 1299. We see no reversible error in the admission of State's Exhibit No. 105.

Appellant contends the trial court erred when it allowed the testimony of Officer Kreinhop regarding a telephone conversation and his actions after he heard the conversation. The officer testified to overhearing a conversation between appellant and his girlfriend, Shirley Slaughter. Appellant is apparently arguing that eavesdropping upon his conversation violated his Fourth Amendment rights and that any evidence and investigation resulting from the overhearing of the conversation should be suppressed.

At trial, however, appellant's objection was not based upon this Fourth Amendment claim. His objection at trial was that there was a discovery violation, both because he had not been apprised of any statement of his own made in the telephone conversation and because any statement by Shirley Slaughter was hearsay. We further would observe that the trial court sustained appellant's objection to the content of the conversation overheard by Detective Kreinhop. Testimony as to what the officer did after he heard the telephone conversation has been held to be proper evidence. *See Hester v. State* (1987), Ind., 512 N.E.2d 1110; *Boyd, supra.* We see no reversible error in permitting the officer to testify as to what avenue of investigation he pursued after hearing the telephone conversation.

The trial court is affirmed.

SHEPARD, C.J. and PIVARNIK, J., concur.

DEBRULER, J., dissents with separate opinion.

DICKSON, J., concurs in result without separate opinion.

DEBRULER, Justice, dissenting.

The same safeguards should be employed by the police forces in voice identification procedures as are employed in seeking visual or photographic identifications. *Matthews v. State* (1988), Ind., 518 N.E.2d 807. The admissibility of the products of such procedures is to be determined upon application of a two-pronged test, the first prong of which is the determination from a totality of the circumstances of whether the procedures are unduly and unnecessarily suggestive, and the second prong of which is whether, if so unduly and unnecessarily sug-

gestive, there was created a substantial likelihood of irreparable misidentification. *Norris v. State* (1976), 265 Ind. 508, 356 N.E.2d 204. If a process fails the test and produces a tainted out-of-court identification by a witness, such witness may nevertheless make an in-court identification if that in-court identification does not depend upon the pre-trial one, but has an independent origin. *Id.*

Here, there is no evidence that the witness Standriff was previously acquainted with appellant's voice or that of the unidentified assailant before the night of the victim's disappearance. Her identification was very uncertain up to the point in time, one week before the trial, when she visited the police station. The voice which she did hear uttered only a few words. American English was not the mother tongue of the witness. She was from the Philippines. She was not a victim, with attention fixed upon one who was attacking her, but simply a neighbor overhearing a neighborhood brouhaha. When, therefore, she came to the police station and asked to hear the suspect's recorded voice, and the police had such a recording, they were under a duty, the same as if the idea had been theirs, to present her with a fair voice identification array or lineup. *Matthews*, 518 N.E.2d 807. Under the totality of these circumstances, their failure to employ such a fair procedure created a very substantial likelihood of irreparable misidentification. The same set of circumstances indicate that there was no independent origin for her in-trial identification from a similar tape of appellant's voice. It was therefore constitutionally inadmissible. I would reverse and remand for a new trial at which such identification testimony would be excluded.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

Docket No. S90-00305

Name Roy Heck, Sr., Prisoner No. 874376
Place of Confinement

Westville Correctional Center
P.O. Box 473/Dorm P-2
Westville, Indiana 46391-0473

ROY HECK, SR.
Petitioner

v.

THOMAS D. RICHARDS,
Respondent

The Attorney General of the State of: Indiana—Linley E. Pearson

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

[Filed Jun. 19, 1990]

1. Name and location of court which entered the judgment of conviction under attack Dearborn Circuit Court, Lawrenceburg, Indiana
2. Date of judgment of conviction July 30th, 1987
3. Length of sentence Fifteen (15) Years
4. Nature of offense involved (all counts) Murder-found guilty of Voluntary Manslaughter

5. What was your plea? (Check one)

   (a) Not guilty ☒

   (b) Guilty ☐

   (c) Nolo contendere ☐

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

   _____

   _____

6. Kind of trial: (Check one)

   (a) Jury ☒

   (b) Judge only ☐

7. Did you testify at the trial?

   Yes ☒ No ☐

8. Did you appeal from the judgment of conviction?

   Yes ☒ No ☐

9. If you did appeal, answer the following:

   (a) Name of court Indiana Supreme Court

   (b) Result Affirmed

   (c) Date of result April 6th, 1990

   (d) Grounds raised 1. Insufficient Evidence,) 2. Conviction was contrary to law in a pre-trial voice identification being inpermissability suggestive.) 3. Judgment was contrary to law due to prejudicial irrelevant hearsay testimony of State's witnesses.) 4. The court erred in allowing rebuttal testimony of Roberta Heck.) 5. The court abused its discretion in allowing testimony of state's rebuttal witnesses after being on notice of the separation order being

violated.) 6. The court erred in admitting State's exhibits 2, 3, 101 and 105.) 7. The court erred in allowing testimony of officer Kreinhop regarding his actions after over hearing a telephone conversation of the defendant.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

    Yes ☐ No ☒

11. If your answer to 10 was "yes," give the following information:

    (a) (1) Name of court N/A

    (2) Nature of proceeding N/A

    (3) Grounds raised N/A

    (4) Did you receive an evidentiary hearing on your petition, application or motion?

    Yes ☐ No ☐

    (5) Result N/A

    (6) Date of result N/A

    (b) As to any second petition, application or motion give the same information:

    (1) Name of court N/A

    (2) Nature of proceeding N/A

    (3) Grounds raised N/A

    (4) Did you receive an evidentiary hearing on your petition, application or motion? N/A

    Yes ☐ No ☐

    (5) Result

(6) Date of result N/A

(c) As to any third petition, application or motion, give the same information:

(1) Name of court N/A

(2) Nature of proceeding N/A

(3) Grounds raised N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result N/A

(6) Date of result N/A

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☒ No ☐

(2) Second petition, etc. Yes ☐ No ☐

(3) Third petition, etc. Yes ☐ No ☐

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: N/A

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: Conviction was obtained without evidence sufficient to support a verdict of Voluntary Manslaughter.

Supporting FACTS (tell your story *briefly* without citing cases or law): The evidence presented failed to establish petitioner inflicted any injury which may have caused the decedent's death or any action which could be considered as a deliberate intent to do so: Further, the cause of death was not established; the petitioner does not feel that a blow hard enough to fracture a jaw would cause death to any person, which would not make this an adequate means of death.

B. Ground two: Conviction was obtained by illegal over suggestive voice identification.

Supporting FACTS (tell your story *briefly* without citing cases or law). State's witness Tessie Standriff, (18) months after the alleged incident, and one (1) week prior to petitioner's trial, requested to hear a tape recording of petitioner's voice; Authorities provided such with the petitioner. During Petitioner's trial Standriff identified his voice on the tape recording, and testified authorities told her it was petitioner's voice prior to her listening to the tape. As reference SEE Attached Exhibit A.

C. Ground three: Petitioner was denied assistance of counsel during the identification stage.

Supporting FACTS (tell your story *briefly* without citing cases or law): Authorities provided

Tessie Standriff with a recording of petitioner's voice, without affording Petitioner's counsel an opportunity to be present and consealing same until the day of trial.

D. Ground four: In abusing it's descretion, the trial court violated petitioner's right to a fair trial.

Supporting FACTS (tell your story *briefly* without citing cases or law): The monumental amount of hearsay testimony was labeled as "state of mind" of either the petitioner or the decedent, all of which acted to prejudice the jury and amounted to a probability that the petitioner is the one who took the decedent's life.

E. Ground Evidence was illegally obtained, used and presented to the jury.

Supporting FACTS (tell your story *briefly* without citing cases or law): Police officer Michael Kreinhop, was allowed to testify in depth concerning his actions after "eavesdropping" on petitioner's telephone call from the Dearborn County Jail, which was suppose to be a private phone. Officer Kreinhops testimony was highly prejudicial to the petitioner before the jury.

F. Ground _____

_____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

_____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court,

state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: It may be presumed arguendo, that Appellate Counsel did not as an issue specifically raise ground C-three. However, the issue is mentioned within the Appellate Brief at (20) argument "B". Petitioner can only cite this as an oversight of his Appellate Counsel.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Joseph Votaw III. 230 West High St. Lawrenceburg, In. 47025 (812-537-4500)

(b) At arraignment and plea "SAME AS ABOVE"

(c) At trial Joseph Votaw III. and John J. Darnette

(d) At sentencing Joseph Votaw III. and John J. Darnette

(e) On appeal Kathleen A. Dayson, 6050 East 10th St. Indianapolis, In. 46219 (317-352-1251)

(f) In any post-conviction proceeding N/A

(g) On appeal from any adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future: N/A

(b) Give date and length of the above sentence: August 18th, 1987 sentenced to an executed term of fifteen (15) years.

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No n/a

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 15, 1990.

/s/ Roy Heck, Sr.
Signature of Petitioner

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Civil No. S 90-305

ROY HECK, SR.,
Petitioner

v.

THOMAS D. RICHARDS; and
INDIANA ATTORNEY GENERAL
Respondents

MEMORANDUM AND ORDER

[Filed Jan. 7, 1991]

On June 19, 1990, *pro se* petitioner, Roy Heck, Sr., an inmate at the Westville Correctional Center, filed a petition seeking relief under 28 U.S.C. § 2254. The return and motion to dismiss filed by the respondents on November 19, 1990, demonstrates the necessary compliance with *Lewis v. Faulkner*, 689 F.2d 100 (7th Cir. 1982).

The petitioner was convicted in the Dearborn Circuit Court in Lawrenceburg, Indiana, of the crime of voluntary manslaughter. He was sentenced to 15 years in prison. His sentence was affirmed on direct appeal to the Supreme Court of Indiana, as reflected in *Heck v. State*, 552 N.E.2d 446 (Ind. 1990).

Here, he raises four grounds for this petition under 28 U.S.C. § 2254, as follows:

(1) conviction obtained without evidence sufficient to support a verdict of voluntary manslaughter;

(2) conviction obtained by illegal, over suggestive voice identification;

(3) petitioner denied assistance of counsel during the identification stage.

(4) trial court abused its discretion and violated petitioner's right to a fair trial.

Three of the above issues were presented on direct appeal to the Supreme Court of Indiana. The issue regarding denial of assistance of counsel was not so presented. It is basic and elementary under *Rose v. Lundy*, 455 U.S. 509 (1982), *Duckworth v. Serrano*, 454 U.S. 1 (1981), and *Varnell v. Young*, 839 F.2d 1245 (7th Cir. 1988), that as a prerequisite to seeking relief under § 2254, available state remedies must be exhausted. Recently, Justice Scalia, speaking for the Supreme Court of the United States in *Castille v. Peoples*, 489 U.S. 346 (1989), reaffirmed the same in no uncertain terms. Most recently, *see also Cruz v. Warden of Dwight Correctional Center*, 907 F.2d 665 (7th Cir. 1990).

Since there are readily available remedies being pursued, they must be exhausted. Therefore, this petition is now DISMISSED WITHOUT PREJUDICE. IT IS SO ORDERED.

DATED: January 7, 1991

/s/ Allen (Illegible)
Chief Judge
Northern District of Indiana

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

Case Number: S 90-305

ROY HECK, SR.,
Petitioner

v.

THOMAS D. RICHARDS; and
INDIANA ATTORNEY GENERAL

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

☐ IT IS ORDERED AND ADJUDGED that this petition is now dismissed without prejudice since there are readily available remedies being pursued.

Date January 7, 1990

RICHARD E. TIMMONS
Clerk

/s/ [Illegible]
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

Name Roy Heck, Sr., Prisoner No. 874376
Place of Confinement

Westville Correctional Center
P.O. Box 473/dorm O-1
Westville, Indiana 46391-0473

ROY HECK, SR.,
Petitioner

v.

THOMAS D. RICHARDS,
Respondent

Attorney General of the State of: Indiana—Linley E. Pearson

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

[Filed Jan. 22, 1991]

1. Name and location of court which entered the judgment of conviction under attack Dearborn Circuit Court, Lawrenceburg, Indiana
2. Date of judgment of conviction July 30th, 1987
3. Length of sentence Fifteen Years
4. Nature of offense involved (all counts) Murder—found guilty of Voluntary Manslaughter

5. What was your plea? (Check one)

   (a) Not guilty ☒

   (b) Guilty ☐

   (c) Nolo contendere ☐

   If you entered a guilty plea to one count of indictment, and a not guilty plea to another count of indictment, give details: N/A

6. Kind of trial: (Check one)

   (a) Jury ☒

   (b) Judge only ☐

7. Did you testify at the trial?

   Yes ☒ No ☐

8. Did you appeal from the judgment of conviction?

   Yes ☒ No ☐

9. If you did appeal, answer the following:

   (a) Name of court Indiana Supreme Court

   (b) Result Affirmed

   (c) Date of result April 6th, 1990

   (d) Grounds raised 1. Insufficient evidence) 2. Conviction was contrary to law in pre-trial voice identification being impermissability suggestive. 3. Judgment was contrary to law due to prejudicial irrevelent hearsay testimony of state's witnesses.) 4. The court errored in allowing rebuttal testimony of Roberta Heck.) 5. The court abused its descretion in allowing testimony of states rebuttal witnesses after being on notice of the separation order being violated.) 6. The court errored in allowing testimony of officer Kreinhop regarding his ac-

tions after over hearing a telephone conversation of the defendant.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

    Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

    (a) (1) Name of court Northern District Court under cause S90-305

    (2) Nature of proceeding Petition for writ of habeas corpus 28 U.S.C. 2254

    (3) Grounds raised same as listed herein with the exception of ground (3) which was removed due to being unexhausted

    (4) Did you receive an evidentiary hearing on your petition, application or motion?

    Yes ☐ No ☒

    (5) Result Dismissed without prejudice

    (6) Date of result January 7th, 1991

    (b) As to any second petition, application or motion give the same information:

    (1) Name of court N/A

    (2) Nature of proceeding N/A

    (3) Grounds raised N/A

    (4) Did you receive an evidentiary hearing on your petition, application or motion?

    Yes ☐ No ☐

    (5) Result N/A

(6) Date of result N/A

(c) As to any third petition, application or motion, give the same information:

(1) Name of court N/A

(2) Nature of proceeding N/A

(3) Grounds raised N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result N/A

(6) Date of result N/A

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☐ No ☐

(2) Second petition, etc. Yes ☐ No ☐

(3) Third petition, etc. Yes ☐ No ☐

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: N/A

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting such ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail

to set forth all grounds in this petition you will be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: Conviction was obtained without evidence sufficient to support a conviction of Voluntary Manslaughter.

Supporting FACTS (tell your story *briefly* without citing cases or law): The evidence presented failed to establish petitioner inflicted any injury which may have caused the decedent's death or any action which could be considered as a deliberit intent to do so: Further, the cause of death was not established; The petitioner does not feel that a blow hard enough to fracture a jaw would cause death to any person, which would not make this an adequate cause of death.

B. Ground two: Conviction was obtained by illegal over suggestive voice identification.

Supporting FACTS (tell your story *briefly* without citing cases or law): State's witness, Tessie Standriff, (18) months after the alleged incident, and one (1) week prior to petitioner's trial, requested to hear a tape recording of petitioner's voice; Authorities provided such with the petitioner. During petitioner's trial Standriff identified his voice on a tape recording, and testified that authorities told her it was the petitioner's voice prior to her listening to the tape. As reference, see attached exhibit A.

C. Ground three: In abusing its discretion, the trial court violated petitioner's right to a fair trial.

Supporting FACTS (tell your story *briefly* without citing cases or law): The monumental amount of hearsay testimony was labled as "state of mind" of either the petitioner or the decedent, all of which acted to prejudice the jury and amounted to a probability that the petitioner is the one who took the decedent's life.

D. Ground four: Evidence was illegally obtained, used and presented to the jury.

Supporting FACTS (tell your story *briefly* without citing cases or law): Police officer Michael Kreinhop, was allowed to testify in depth concerning his actions after "eavesdropping" on petitioner's telephone call from the Dearborn County Jail, which was suppose to be a private phone. This testimony was highly prejudicial to the petitioner before the jury.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: N/A

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Joseph Votaw III. 230 West High St. Lawrenceburg, In. 47205 (812) 537-4500

(b) At arraignment and plea "same as above"

(c) At trial Joseph Votaw III. and John Darnette

(d) At sentencing Joseph Votaw III. and John Darnette

(e) On appeal Kathleen A. Dayson 6050 East 10th St. Indianapolis, In. 46219 (317) 352-1251

(f) In any post-conviction proceeding N/A

(g) On appeal from any adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future:

N/A

(b) Give date and length of the above sentence: August 18th, 1987 sentenced to an executed term of fifteen (15) years.

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☒

Wherefore, petitioners pray that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on Jan. 14, 1991.

/s/ Roy Heck, Sr.
Signature of Petitioner

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Civil No. S 91-40

ROY HECK, SR.,
Petitioner

v.

THOMAS RICHARDS and INDIANA ATTORNEY GENERAL,
Respondents

MEMORANDUM AND ORDER

[Filed July 31, 1991]

On January 30, 1991, *pre se* petitioner, Roy Heck Sr., an inmate at the Westville Correctional Center, filed a petition seeking relief under 28 U.S.C. § 2254. The return filed by the respondents on April 30, 1991, demonstrates the necessary compliance with *Lewis v. Faulkner*, 689 F.2d 100 (7th Cir. 1982). The state court record has been filed and examined pursuant to the mandates of *Townsend v. Sain*, 372 U.S. 293 (1963). The petitioner has filed an elaborate, 25-page Traverse on June 5, 1991, which has been examined.

The petitioner was convicted in the Dearborn Circuit Court of the offense of voluntary manslaughter. He was sentenced to a 15-year term of imprisonment. A direct appeal was taken to the Supreme Court of Indiana which affirmed the aforesaid conviction in a majority opinion authored by Justice Givan and reported as *Heck v. State*, 552 N.E.2d 446 (Ind. 1990). Justice DeBruler dissented with opinion and Justice Dickson dissented without opinion.

An earlier petition for relief under 28 U.S.C. § 2254 was filed in this court on June 19, 1990, under cause number S90-305, and this court entered a Memorandum on January 7, 1991, dismissing the petition without prejudice, due to the failure to exhaust an issue in the state courts.

Here, this petitioner presents the same issues for review that were presented in S90-305, except he has deleted the issue of denial of effective assistance of counsel. Here, the explicit issues raised are:

> (1) whether this conviction was supported by sufficient evidence;
>
> (2) whether the in-court identification of petitioner's voice by witness Tessie Standriff was tainted by an unduly and unnecessarily suggestive out-of-court identification;
>
> (3) whether the state trial court violated the petitioner's right to a fair trial by allowing in alleged hearsay testimony; and
>
> (4) whether allowing Officer Michael Kreinhop to testify concerning his actions after eavesdropping on a telephone conversation with Heck constituted the admission of illegally-obtained evidence.

The Indiana statute under which this petitioner was charged and convicted was Indiana Code § 35-42-1-3, which provides in part:

> (a) a person who knowingly or intentionally kills another human being while acting under sudden heat commits voluntary manslaughter, a Class B felony.
>
> (b) The existence of sudden heat is a mitigating factor that reduces what otherwise would be murder under section 1(1) [35-42-1-1-(1)] of this chapter to voluntary manslaughter.

The relevant facts with reference to this offense are stated by Justice Givan, as follows:

> The appellant, Roy Heck, Sr., and the decedent, Rickie Heck, were husband and wife. In August of 1985, Rickie started dissolution proceedings against appellant. Sometime between January 5 and 6, 1986, while the dissolution proceedings were pending, the decedent disappeared.
>
> In late October of 1986, her decomposed remains were found buried on appellant's farm. Dr. Lee Lehman, a pathologist, testified that he performed an autopsy on the remains of the decedent in October of 1986, but because of the advanced decomposition of the remains, he found no demonstrative cause of death. However, after further consideration, the pathologist's report was changed, and because of a broken jaw, which he believed had been inflicted near the time of death, he theorized the probability was that the decedent had died as a result of a severe blow to the head.
>
> Near midnight on January 6, 1986, a number of witnesses in the vicinity of the trailer in which the decedent lived heard an argument between the decedent and another person. Some of these people did not see the other person, while others stated that they saw the decedent arguing with a tall young man. One of these witnesses, Tessie Standriff, stated that her trailer was near the decedent's trailer and that she heard the argument and could identify appellant as the person arguing with the decedent. She stated that she could not identify him by his face, but could identify him by his voice.
>
> At trial, she testified that appellant told the victim she was coming home because she was his wife. However, during a pretrial deposition, she had indicated she had not heard such a statement. The evidence shows that Mrs. Standriff was Philippine and

had a limited use and understanding of the English language.

Some of the witnesses testified they heard screaming and gunshots that night. Following the decedent's disappearance, appellant told various relatives that she had told him she was taking a trip to Florida. When Roy Heck, Jr. went with appellant to the decedent's trailer, he noted food still on the stove. He also noticed the trailer was messed up, which was unusual for his mother. The following day, Junior observed one of his mother's suitcases in appellant's home.

A few weeks before the victim's disappearance, appellant had beaten her and was scheduled to go on trial on charges stemming from that incident the week the victim disappeared. When he failed to appear in court, he was arrested. While in jail, he was visited by his daughter, Roberta, and his girlfriend, Shirley Slaughter. He asked them to sprinkle pepper over the site of a sinkhole on his farm (this is the location where the body eventually was found). He also asked them to remove the victim's possessions from his home, including spare purses and a suitcase, before the police searched the house. The women complied with the request the next day. The suitcase contained items of female apparel. The purpose contained the victim's drivers license, social security card, make-up and other such items.

Appellant also requested that the two women telephone the police pretending to be the victim. Shirley attempted to comply with appellant's request. Appellant later told Roberta to keep quite about her mother's purse and drivers license.

Robert Cuneo testified that he and his father were in the roof repair business and that in times past appellant had permitted them to dump old shingles on his farm. Shortly after the victim's disappear-

ance, appellant contacted the elder Cuneo and asked him to dump some old shingles in the area where the victim's body later was found. He told Cuneo that he wanted the shingles dumped there to cover up the smell of some soured corn. Robert Cuneo testified that the area appeared to have been recently dug out and smoothed over.

In March of 1986, Roberta was in Florida with Eleanor Slaughter, Shirley's mother-in-law, and Shirley's daughter, Shawn Theis. She observed that Eleanor had the victim's ring in her possession with other jewelry to be sold. Eleanor told her that appellant had given her the ring to sell. Appellant later claimed that he had obtained the ring when the victim threw it at him during an argument.

In October of 1986, appellant was served with a warrant to search his farm and in particular the sinkhole site where the victim's remains later were found. Shortly after the warrant was served, appellant left and went to Tennessee. However, he returned shortly and turned himself in to police.

Heck, 552 N.E.2d at 448-449.

Justice Stewart, speaking for the Supreme Court of the United States in *Jackson v. Virginia*, 443 U.S. 307 (1979), stated:

> A judgment by a state appellate court rejecting a challenge to evidentiary sufficiency is of course entitled to deference by the federal courts, as in any judgment affirming a criminal conviction. But Congress in § 2254 has selected the federal district courts as precisely the forums that are responsible for determining whether state convictions have been secured in accord with federal contitutional law. The federal habeas corpus statute presumes the norm of a fair trial in the state court and adequate state post-conviction remedies to redress possible error. See 28

> U.S.C. § 2254(b), (d). What it does not presume is that these state proceedings will always be without error in the constitutional sense. The duty of a federal habeas corpus court to appraise a claim that constitutional error did occur—reflecting as it does the belief that the "finality" of a deprivation of liberty through the invocation of the criminal sanction is simply not to be achieved at the expense of a constitutional right—is not one that can be so lightly abjured.

Id. at 323. The Supreme Court in *Jackson* held:

> We hold that in a challenge to a conviction brought under 28 U.S.C. § 2254—if the settled procedural prerequisites for such a claim have otherwise been satisfied—the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof beyond a reasonable doubt.

Id. (footnote omitted). *See also Sumner v. Mata*, 449 U.S. 539 (1981); *Dooley v. Duckworth*, 832 F.2d 445 (7th Cir. 1987), *cert. denied*, 485 U.S. 967 (1988); *United States ex rel. Haywood v. O'Leary*, 827 F.2d 52 (7th Cir. 1987); *Bryan v. Warden, Indiana State Reformatory*, 820 F.2d 217 (7th Cir.), *cert. denied*, 484 U.S. 867 (1987); *Shepard v. Lane*, 818 F.2d 615 (7th Cir.), *cert. denied*, 484 U.S. 929 (1987); and *Perri v. Director, Department of Corrections*, 817 F.2d 448 (7th Cir.), *cert. denied*, 484 U.S. 843 (1987).

A review of the record in the light most favorable to the prosecution convinces the court that a rational trier of fact could readily have found the petitioner guilty beyond a reasonable doubt of voluntary manslaughter.

Following *Jackson*, 443 U.S. at 307, there is an increasingly long line of cases in this circuit that suggest that the facts found by the highest court of a state are presumed correct. The most recent statement of that principle is found in *Anderson v. Thieret*, 903 F.2d 526, 531 (7th Cir. 1990).

The next issue presented has to do with identification, an issue that is often troubling. *See United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972). A part of the tension between Justice DeBruler's opinion and the majority opinion of Justice Givan centers on this very issue under state law. Apparently, Justice DeBruler does not challenge the statement of facts that is above quoted.

The historic facts which the majority of the Indiana Supreme Court relied on in regard to identification are included in the statement above quoted from Justice DeBruler's opinion. There is obviously a disagreement between Justices DeBruler and Givan on the interpretation of these facts. This court is frankly hard-pressed to find a constitutional issue in this inter-justice dispute. One cannot tell what Justice Dickson was concerned about. Certainly, this court can presume as correct under 28 U.S.C. § 2254(d) the historic facts involved in this dispute, but in the interest of the greatest of caution and perhaps not specifically mandated by *Miller v. Fenton*, 474 U.S. 104 (1985), this court has taken the trouble to make an independent investigation of the evidence regarding identification. This court is well aware of concerns expressed in *Dudley v. Duckworth*, 854 F.2d 967 (7th Cir. 1988), *cert. denied*, 490 U.S. 1011 (1989). More recently, compare *Hunter v. Clark*, No. 89-2594 (7th Cir. June 6, 1991).

In *United States v. Dominguez*, 835 F.2d 694 (7th Cir. 1987), there was a dispute over voice identification. Under *Rodriguez v. Young*, 906 F.2d 1153, 1161 (7th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 698 (1991), there appears to be a judicially imposed recipe to deal with such challenges as to identification testimony. In this regard, *United States v. Telfaire*, 469 F.2d at 552, remains useful reading. However, see *United States v. Anderson*, 739 F.2d 254 (7th Cir. 1984).

This court also understands quite clearly that while the facts found by the highest court in Indiana are presumed to be correct, the court has to decide questions of constitutional law under *Bell v. Duckworth*, 861 F.2d 169 (7th Cir. 1988), *cert. den.* 489 U.S. 1088 (1989), independently. Such has been done here. In *Rodriguez v. Young*, 906 F.2d at 1153 the court set out a two-part test to govern challenges to identification testimony. That court said that a defendant (here petitioner) must first prove that the challenged identification was preceded by unnecessarily suggestive police procedures. Here, the Supreme Court of Indiana, speaking through Justice Givan, opined that the fact that the witness went to the police and requested to hear a tape-recording of petitioner's voice did not fall within a police engineered lineup for voice identification. The witness wanted to be assured that she was correct in believing that the person she heard was the petitioner. The witness, Ms. Standriff, had the benefit of the police playing the tape of petitioner's voice outside of his presence.

It appears that the procedures adopted by the state trial court which focused upon the concept of reliability were adequate to meet the due process standards of the Fourteenth Amendment and any confrontation standards in the Sixth Amendment in regard to this issue. Upon an examination of the record, this court determines that the issue was fairly presented to the trier of fact in this case the jury, and does not fall afoul of any of the aforesaid constitutional mandates.

Even if the identification was preceded by an unnecessarily suggestive police procedure, the due process clause of the Fourteenth Amendment is not per se violated. The key consideration is reliability. In this case, the jury was given a full opportunity to evaluate the credibility of Ms. Standriff's testimony. There was no reversible error in the way that Judge Meyer chose to manage this sensitive problem and there is no constitutional error.

There is a further assertion here and in the Supreme Court of Indiana with regard to the admissibility of hearsay testimony. The Supreme Court of Indiana, speaking through Justice Givan, rejected that concept at page 451 of the opinion. A petitioner under § 2254 is hard-pressed to make a constitutional claim out of an evidentiary ruling. *See Haas v. Abrahamson*, 910 F.2d 384, 389 (7th Cir. 1990). Certainly, prior threats and assaults upon the victim by the accused to prove state of mind and motive have long been admissible under the law of Indiana, and certainly the complicated and sometimes conflicting hearsay rules are not to be emboldened in constitutional stone to prevent a state court from admitting that kind of testimony.

The court is well aware of the problems that inhere under Federal Evidence Rule 404(b) of the admissibility of "other wrongs" testimony. *See United States v. Penson*, 896 F.2d 1087, 1091-1092 (7th Cir. 1990). The Supreme Court of the United States has dealt somewhat generously with that subject in *United States v. Huddleston*, 485 U.S. 681 (1988), and particularly the last paragraph of that opinion which states:

> We share petitioner's concern that unduly prejudicial evidence might be introduced under Rule 404(b). See *Michelson v. United States*, 335 U.S. 469, 475-76, 69 S.Ct. 213, 218-219, 93 L.Ed. 168 (1948). We think, however, that the protection against such unfair prejudice emanates not from a requirement of a preliminary finding by the trial court, but rather from four other sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402—as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential

> for unfair prejudice, see Advisory Committee's Notes on Fed.Rule Evid. 404(b), 28 U.S.C.App., p. 691; S.Rep. No. 93-1277, at 25; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted. *See United States v. Ingraham*, 832 F.2d 229, 235 (CA1 1987).

Id. at 691.

Another assertion is made that the petitioner was denied a fair trial when the state trial court allowed inhearsay testimony by labeling it "state of mind." That issue was discussed at page 451 by Justice Givan and basically it passed muster under state law. The focus now must be whether or not these evidentiary rulings violated the due process clause of the Fourteenth Amendment by denying this petitioner a fair trial. *See Haas v. Abrahamson*, 910 F.2d 384 (7th Cir. 1990).

It is not asserted that the Confrontation Clause of the Sixth Amendment of the Constitution was violated in the context of *Bruton v. United States*, 391 U.S. 123 (1968), and *Richardson v. Marsh*, 481 U.S. 200 (1987). Most recently, see the opinion of Chief Judge Bauer in *United States v. Strickland*, Nos. 89-3099, 89-3100, 89-3118, 89-3134, and 89-3135 (7th Cir. June 11, 1991), slip. at pps. 4-6.

Rather, there is a complaint that the state trial court admitted into evidence the testimony of Officer Michael Kreinhop to testify concerning his eavesdropping on petitioner's telephone call from the Dearborn County Jail. It is alleged that such was illegally obtained evidence. The Supreme Court of Indiana in addressing this issue stated:

> The officer testified to overhearing a conversation between appellant and his girlfriend, Shirley Slaughter. Appellant is apparently arguing that eavesdropping upon his conversation violated his Fourth Amendment rights and that any evidence and investigation resulting from the overhearing of the conversation should be suppressed.
>
> At trial, however, appellant's objection was not based upon his Fourth Amendment claim. His objection at trial was that there was a discovery violation, both because he had not been apprised of any statement of his own made in the telephone conversation and because any statement by Shirley Slaughter was hearsay. We further would observe that the trial court sustained appellant's objection to the content of the conversation overheard by Detective Kreinhop.

Heck v. State, 552 N.E.2d at 453.

An independent review of the record clearly indicates that the officer did not testify as to any conversation he overheard. Therefore, no constitutional violation attaches to the officer's testimony, especially in light of the fact that the trial court sustained the petitioner's objection to the content of the conversation overheard by Detective Kreinhop.

For the foregoing reasons, the petitioner's motion for Appointment of Counsel and Evidentiary Hearing should be, and hereby are, DENIED.

A careful review of the record in this case fails to disclose a basis on which relief can be granted under 28 U.S.C. § 2254. Such relief is now DENIED. IT IS SO ORDERED.

DATED: July 30, 1991

/s/ Allen Sharp
Chief Judge
Northern District of Indiana

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

Case Number S91-00040

ROY HECK, SR.

v.

THOMAS RICHARDS; and INDIANA ATTORNEY GENERAL

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED BY CHIEF JUDGE ALLEN SHARP that the petitioner take nothing and relief under 28 U.S.C. § 2254 is DENIED.

This document entered pursuant to Rules 79(A) and 58 of the Federal Rules of Civil Procedure on: 7/31/91

Date July 31, 1991

RICHARD E. TIMMONS
Clerk

/s/ [Illegible]
(By) Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
Submitted September 10, 1992 *

September 18, 1992

Before HON. WALTER J. CUMMINGS, Circuit Judge
HON. RICHARD A. POSNER, Circuit Judge
HON. DANIEL A. MANION, Circuit Judge

No. 91-3034

ROY HECK,
Petitioner-Appellant,

v.

THOMAS RICHARDS and INDIANA ATTORNEY GENERAL,
Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Indiana,
South Bend Division

No. 91 C 40—Allen Sharp, *Chief Judge*

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Fed. R. App. P. 34(a); Circuit Rule 34(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

ORDER

Roy Heck, serving a fifteen-year sentence in Indiana for voluntary manslaughter, *see Heck v. State,* 552 N.E.2d 446 (Ind. 1990), seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court refused to grant the writ, and we affirm.

Heck argues that the evidence against him was insufficient. He says first that the state did not adequately prove the cause of his wife's death, and second that he killed her intentionally. Our standard is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979).

Considering all the circumstances in this case, we question the reliability of Ms. Standriff's in-court identification of Heck, particularly absent evidence that she was previously familiar with his voice. Nevertheless, we conclude that even if Ms. Standriff's in-court identification of Heck was unreliable, any constitutional error in admitting her testimony was harmless beyond a reasonable doubt. *Arizona v. Fulminante,* 111 S.Ct. 1246, 1263-64 (1991). The evidence of his guilt was established without it.

Heck also argues that the trial judge erred in allowing hearsay evidence of his physical abuse of his wife which occurred prior to her death. Our review of state court evidentiary rulings is extremely limited. *Haas v. Abrahamson,* 910 F.2d 384, 389 (7th Cir. 1990). A federal court can issue a writ of habeas corpus only when such a ruling results in a denial of due process. *Id.*

The Indiana Supreme Court found that the evidence fell within exceptions to the hearsay rule because it was offered to prove Heck's state of mind and his motive for killing his wife. *Heck v. State,* 552 N.E.2d 446, 451 (Ind. 1990) (citing *Drummond v. State,* 467 N.E.2d

742, 747 (Ind. 1984)). Heck failed to show that the admission of this evidence rendered his trial fundamentally unfair. The same result obtains in the admission of Officer Kreinhop's testimony. The Indiana Supreme Court found no error, *Heck,* 552 N.E.2d at 453, and Heck did not establish otherwise.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Date: September 18, 1992

Before: HONORABLE WALTER J. CUMMINGS,
Circuit Judge
HONORABLE RICHARD A. POSNER,
Circuit Judge
HONORABLE DANIEL A. MANION, Circuit Judge

No. 91-3034

ROY HECK,
Petitioner-Appellant

v.

THOMAS RICHARDS and INDIANA ATTORNEY GENERAL,
Respondents-Appellees

Appeal from the United States District Court
for the Northern District of Indiana,
South Bend Division

No. 91 C 40, Chief Judge Allen Sharp

JUDGMENT—WITHOUT ORAL ARGUMENT

This cause came before the court for decision on the record from the above mentioned District Court.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered this date.

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 89-1323

ROY HECK,
Plaintiff-Appellant,

v.

JAMES HUMPHREY, Dearborn County Prosecutor, ROBERT EWBANK, Attorney, and MICHAEL KRINOPH, Indiana State Police Investigator,
Defendants-Appellees.

Submitted July 24, 1992

Resubmitted March 1, 1993 *

Decided July 1, 1993

Before CUMMINGS, POSNER, and MANION, Circuit Judges.

POSNER, Circuit Judge.

This pro se prisoner civil rights suit charges that the defendants engineered the plaintiff's conviction for murder by, among other wrongful conduct, the destruction of exculpatory evidence. Compensatory and punitive damages were sought. The plaintiff made no effort to exhaust his state remedies against wrongful conviction, however, and this was, as the district court ruled in dismissing

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* After appointment of counsel for the appellant, and receipt of supplemental briefs dealing with the issue of equitable tolling.

the suit, a fatal omission. If, regardless of the relief sought, the plaintiff is challenging the legality of his conviction, so that if he won his case the state would be obliged to release him even if he hadn't sought that relief, the suit is classified as an application for habeas corpus and the plaintiff must exhaust his state remedies, on pain of dismissal if he fails to do so. *Viens v. Daniels,* 871 F.2d 1328, 1332 (7th Cir.1989); *Scruggs v. Moellering,* 870 F.2d 376, 379 (7th Cir.1989); *Hanson v. Heckel,* 791 F.2d 93 (7th Cir.1986) (per curiam). This is such a case, as the plaintiff, while not explicitly requesting that his conviction be vacated, claims that he would not have been convicted had the defendants not violated his constitutional rights. Indeed, if his conviction were proper, this suit would in all likelihood be barred by res judicata.

The difficult question is whether the suit should have been stayed rather than dismissed lest the plaintiff be prevented by the statute of limitations from refiling it after he exhausts his state remedies. The defendants' alleged misconduct took place in 1987 and the applicable statute of limitations is only two years and is not tolled by a plaintiff's imprisonment. Ind.Code §§ 34-1-2-2, 34-1-67-1(6); *Owens v. Okure,* 488 U.S. 235, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989); *Bailey v. Faulkner,* 765 F.2d 102 (7th Cir.1985). So if we affirm the dismissal of his suit, and Heck should later refile after exhausting his state remedies, he will be met by a defense of statute of limitations (through, as we shall see, other state tolling doctrines may be available to him). In these circumstances several decisions of other circuits hold that the district court should stay rather than dismiss the suit. *Jewell v. County of Nassau,* 917 F.2d 738 (2d Cir. 1990) (per curiam); *Young v. Kenny,* 907 F.2d 874, 878 (9th Cir.1990); *Offet v. Solem,* 823 F.2d 1256, 1258 n. 2 (8th Cir.1987); *Richardson v. Fleming,* 651 F.2d 366, 373 (5th Cir.1981). We respectfully disagree. Such an approach gives inadequate weight to the policy

of the statute of limitations, which is to bar stale suits. Should Heck dawdle in exhausting his state remedies, this suit might resume almost a decade after the statute of limitations had expired.

If instead of being stayed, the civil rights suit is dismissed, this sets the stage for confronting the issue of staleness head-on at a time when all the facts bearing on the issue will be known—when the plaintiff, having finally exhausted his state remedies, wishes to resume the civil rights case. When the defendants plead the statute of limitations to a refiled suit, the plaintiff can riposte with the doctrine of equitable tolling—a defense to the defense of statute of limitations. The doctrine is straightforward: "a person is not required to sue within the statutory period if he cannot in the circumstances reasonably be expected to do so." *Central States, Southeast & Southwest Areas Pension Fund v. Slotky,* 956 F.2d 1369, 1376 (7th Cir.1992). It has been applied to a prisoner's civil rights case in which the statute of limitations ran while the prisoner was exhausting his state remedies. *Rodriguez v. Holmes,* 963 F.2d 799, 805 (5th Cir.1992). Rather than giving the plaintiff an automatic extension of indefinite duration, no matter how much his carelessness or sloth may have contributed to the delay in the prosecution of his claim, the doctrine of equitable tolling gives the plaintiff just so much extra time as he needs, *despite all due diligence on his part,* to file his claim. *Cada v. Baxter Healthcare Corp.,* 920 F.2d 446, 451-53 (7th Cir.1990). There must be diligence, and the diligence must continue up to the time of suit—you cannot be diligent for a year, and then wait another year to sue.

The cases that we have cited involve, it is true, the *federal* doctrine of equitable tolling. We have not found any Indiana cases that recognize equitable tolling in so many words as a defense to a statute of limitations. However, *Torres v. Parkview Foods,* 468 N.E.2d 580

(Ind.App.1984), holds that if a plaintiff in good faith files a diversity suit in federal district court but the suit is later held to be outside the diversity jurisdiction and is therefore dismissed without an adjudication of the merits, the statute of limitations for refiling the suit in state court is tolled. This is a form of equitable tolling, and the point emphasized by the court—that the filing of the suit, albeit in the wrong court, gave the defendant all the notice it needed—is equally applicable here. But should it turn out that Indiana would not apply equitable-tolling principles in the circumstances of the present case, this would be of no significance if, in that event, the federal doctrine would be applicable, and we think it would be.

It is true that, although a claim under 42 U.S.C. § 1983 is a federal claim, the statute of limitations applicable to it is a state statute borrowed for the occasion; and the Supreme Court has held that state, not federal, tolling provisions apply to state statutes of limitations borrowed for section 1983 suits. *Board of Regents v. Tomanio,* 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980); *Hardin v. Straub,* 490 U.S. 536, 109 S.Ct. 1998, 104 L.Ed.2d 582 (1989). We held the contrary in *Suslick v. Rothschild Securities Corp.,* 741 F.2d 1000, 1004 (7th Cir.1984), but failed even to cite *Tomanio* (*Hardin* hadn't been decided yet). See *Smith v. City of Chicago Heights,* 951 F.2d 834, 840 (7th Cir.1992). Neither *Tomanio* nor *Hardin,* however, dealt with a situation in which a federal tolling doctrine was essential to the vindication of federal rights. Congress, in enacting 42 U.S.C. § 1988 (which provides that in the event that a federal civil rights statute is "deficient in the provisions necessary to furnish suitable remedies . . . [state law], so far as the same is not inconsistent with [federal law], shall be extended to and govern" the federal trial), intended that "gaps in federal civil rights acts should be filled by state law," *Hardin v. Straub, supra,* 490 U.S. at 538, 109 S.Ct. at 2000, but only "as long as that law is not inconsistent with federal law" and does not defeat section 1983's "chief goals of compensation and deterrence." *Id.* at 538-39, 109 S.Ct. at 2001. *Tomanio* distinguished the case where the federal right "is structured to require previous resort to state proceedings, so that the claim may not even be maintained in federal court unless such resort be had." 446 U.S. at 490, 100 S.Ct. at 1798. That is our case. If we are right that a 1983 plaintiff is not entitled to an indefinite stay while he exhausts whatever state remedies he is required to exhaust because his claim is in part one for habeas corpus, it follows that a body of state tolling law that lacks a provision for equitable tolling is inconsistent with the provision of a complete federal remedy under section 1983 and therefore is overridden by the federal doctrine. *Jewell v. County of Nassau, supra,* 917 F.2d at 740, reached a different conclusion in a similar case, but without giving reasons. Its conclusion became the basis for its ruling that the case should be stayed rather than dismissed; the court could see no other way to avoid the bar of the statute of limitations.

We think the dismissal of Heck's suit should therefore be affirmed. When and if he exhausts his state remedies and refiles this suit, and the defendants plead the statute of limitations, the district judge will have to decide whether the elements of equitable tolling have been met. The inquiry will proceed in three stages. First, was Heck's initial failure to exhaust his state remedies excusable because of the subtlety of the distinction between a pure civil rights suits that does not require exhaustion and an ostensible civil rights suit that is also a de facto habeas corpus action and therefore does require exhaustion? Second, if so, did Heck proceed with due diligence to exhaust his state remedies and to file the renewed civil rights suit as soon as possible afterward? In answering both questions the district judge will of course have due regard for the handicaps under which Heck labors by virtue of being an unrepresented prisoner presumably un-

trained in law. If both questions are answered in the affirmative, a third question becomes relevant—whether the defendants are likely to be substantially prejudiced in their defense of Heck's suit by the long delay, of which they of course cannot be blamed, in the filing of a suit not barred by the doctrine of exhaustion of state remedies. *Seattle Audubon Society v. Robertson*, 931 F.2d 590, 597 (9th Cir.1991). We express no view on the proper answers to these questions in this case; that would be premature. We hold merely that the suit was properly dismissed, rather than stayed. Because this decision creates an intercircuit conflict, we have circulated it to the entire court, pursuant to Circuit Rule 40(f). A majority of the judges voted not to hear the case en banc, Judges Cudahy, Ripple, and Rovner dissenting.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

Cause No. NA 93-108-C

ROY HECK,
Plaintiff,

vs.

JAMES HUMPHREY, ROBERT EWBANK,
and MICHAEL KRINOPH,
Defendants.

ENTRY

This cause is before the Court on the plaintiff's response to the Order of October 19, 1993. Even a careful reader of *Heck v. Humphrey*, 997 F.2d 355 (7th Cir. 1993), would be left with the impression that Mr. Heck had *still* not exhausted his state remedies—and much less that he had sought federal *habeas* relief—at the time of that decision on July 1, 1993. Such an impression would be incorrect: Heck sought *habeas* relief and was denied relief in the Northern District of Indiana in *Heck v. Richards*, No. S 91-40 (N.D.Ind. July 30, 1991), *aff'd* in No. 91-3034 (7th Cir. September 18, 1992) (unpublished order).

While the symmetry of the *habeas* claims and the claims in this civil rights case will have to be developed, it is clear that Heck has proceeded quite far in the direct and collateral challenge of his conviction *qua* conviction. He now insists on money damages from the fiends who concocted the case against him. He will get the chance.

On the basis of the foregoing, the complaint and the supplements, therefore,

IT IS NOW ORDERED that:

1. The previous denial of the plaintiff's request to proceed *in forma pauperis* is reconsidered and is now granted as delineated in this Entry.

2. The Clerk shall file the complaint and issue summonses to the defendants.

3. The Marshal for this District shall serve the defendants with the summons, a copy of the complaint and supplements and of this Entry at the expense of the United States. For the purpose of clarity, the Court construes the claims against the defendants as against them in their individual capacities only and to the extent that the plaintiff attempts to assert a claim against the defendant prosecutor or police investigator in their official capacities the plaintiff's request to proceed *in forma pauperis* is denied as frivolous pursuant to 28 U.S.C. § 1915(d).

/s/ S. Hugh Dillin
S. Hugh Dillin
Judge
United States District Court

Date: 11-3-93

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

No. na 93-108-C

Roy Heck, #874376,
Plaintiff
v.

James Humphrey, Dearborn County Prosecutor, Robert Ewbank, Attorney and Michael Krinoph, Indiana State Police Investigator, All in their official and individual capacities as such,
Defendants

COMPLAINT UNDER THE CIVIL RIGHTS ACT,
42 U.S.C. § 1983

[Filed Nov. 3, 1993]

I. *PARTIES*

(In Item A below, place your name in the first blank and place your present address in the second blank, and if you are a prisoner place your identification number in the third blank. Do the same for additional plaintiffs, if any, under Item B.)

A. Name of Plaintiff Roy Heck #874376
Address Westville Correctional Center, Westville, Ind. 46391
Identification Number 874376
(for prisoners only)

B. Additional Plaintiffs and addresses _____

(In Item C place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment and *address* in the third blank. Use Item D for the names, positions and places of employment of any adidtional defendants and *addresses*.)

C. Defendant James Humphrey is employed as Prosecutor, Dearborn County at Lawrenceburg, Ind. 47025
Robert Ewbank, Attorney Attorney at Law, Lawrenceburg, Indiana 47025
Michael Krinoph, Indiana State Police Investigator Indiana State Police Post, Versailles Indiana.

II. *PREVIOUS LAWSUITS*

A. Have you ever been named as a plaintiff in any other lawsuits in state or federal court dealing with the same facts involved in this action, or otherwise relating to your claim in this action?

YES (X) NO ( )

B. If your answer to "A" is YES, describe the lawsuit in the space below and attach a copy of your complaint in that lawsuit if you have a copy. (If there is more than one such lawsuit, you must describe the additional lawsuits on another piece of paper, using this same outline.) Failure to comply with this provision may result in summary disposition of your complaint.

1. Parties to previous lawsuit:

Plaintiff(s) Roy Heck #874376
Defendant(s) James Humphrey, Dearborn County Prosecutor Robert Ewbank, Attorney and Michael Krinoph State Police Investigator.

2. Court (if federal court, name the district (e.g. Southern District of Indiana); if state court, name the count, and state.) United States District Court for the Southern District of Indiana, New Albany Division.

3. Docket Number 88 C 209

4. Name of Judge to whom case was assigned James E. Noland

5. Disposition (for example: Was the case dismissed? Was it appealed? Is it still pending?)

Dismissed by Southern District Court, appealed to 7th. Circuit
Dismissal affirmed, 7/1/93
7th. Circuit Court decision attached.

6. Approximate date of filing lawsuit December, 1988

7. Approximate date of disposition 1989

C. Have you ever been a plaintiff in any other civil rights lawsuit (other than those lawsuits described in your response to "B" above)?

YES (X) NO ( )

D. If your answer to "C" is YES, describe the lawsuit in the space below. (If you have been a plaintiff in more than one such lawsuit, describe the additional lawsuits on another piece of paper.)

1. Parties to previous lawsuit:

Plaintiff(s) Roy Heck #874376
Defendant(s) Russell Cunningham

2. Court (if federal court, name the district (e.g. Southern District of Indiana); if state court, name the county and state.)

United States District Court for the Southern District of Indiana, New Albany Division.

3. Docket Number NA-210-C

4. Name of Judge to whom case was assigned GENE BROOKS

5. Disposition (for example: Was the case dismissed? Was it appealed? Is is still pending?)

Dismissed by Southern District Court, Appealed to 7th Circuit, remanded and is now pending.

6. Approximate date of filing lawsuit December, 1988

7. Approximate date of disposition Pending

8. Give a brief description of the nature of the lawsuit (e.g. "I claimed the conditions of my confinement at the Indiana State Prison violated my civil rights under the Eighth Amendment.")

Plaintiff, Roy Heck was denied medical treatment by the Defendant, Russell Cunningham, sheriff of Dearborn County.

III. *PRISON GRIEVANCE PROCEDURE* (THIS SECTION TO BE COMPLETED BY PRISONERS ONLY)

A. Place of present confinement Westville Correctville Center Box 473, Westville, Indiana 46391

B. Is there a prisoner grievance procedure in this institution?

YES (X) NO ( )

C. Did you present the fact relating to your complaint in the prison grievance procedure?

YES ( ) NO (X)

D. If your answer is "YES":

1. What steps did you take? _____

_____

2. What was the result? _____

_____

E. If you did not use the griveance system, explain why not.

This cause of action does not involve the correctional center.

F. If there is not a prison grievance procedure in this institution, did you complain to prison authorities?

YES ( ) NO (X)

G. If your answer is "YES":

1. What steps did you take? _____

2. What was the result? _____

H. If your answer is "NO", explain why not.

This cause of action does not involve the correctional center.

I. Attach copies of your request for an administrative remedy and the response(s) you received. If you cannot do so, explain why not.

None

IV. *CAUSE OF ACTION*

Briefly state *which* of your constitutional rights, privileges or immunities have been violated and summarize in one or two sentences *what the defendant(s) did to violate your rights in that regard.* (You must identify individual defendants by name, but you do not need to make a detailed statement of facts here—you will have a chance

to do so in the next section.) If you are claiming that more than one of your constitutional rights was violated, use a separate paragraph for each right, privilege or immunity which was violated.

Defendants, James Humphrey, Robert Ewbank, and Michael Krinoph, acting under color of state law, conspired and/or acted in concert with a meeting of the mind to subject plaintiff Heck to an illegal investigation in violation of the Fourth, and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. 1983, 1985(2) 1986(2), and 1988.

The Defendants actions were preliminary police investigative activity to gather evidence illegally, at all times during this unlawful, unreasonable, and arbitrary investigation the defendants knew Plaintiff had clearly established U.S. Constitution and Statutory rights to be free from this type of illegal conduct by public officials, yet they override them in concert.

Defendants, Humphrey and Ewbank, even though County Prosecutors at said time, were acting as "police investigators", and not functioning in their quasi-judicial capacities against the plaintiff. All the named defendants had prior knowledge of the wrongs conspired to be done against the plaintiff, and having power to prevent or aid in the prevention of same. The defendants neglected or refused to do anything to prevent the plaintiff's civil rights from being violated.

V. *STATEMENT OF FACTS*

State here, as briefly as possible, the FACTS of your case. *State who, what, when, where and how you feel your constitutional rights were violated.* You must name or somehow refer to the people as defendants whom you contend hurt you or caused you harm in some way. Include also the names of other persons involved, dates and places. Use no more than the space provided. The court strongly disapproves of stating claims outside the space.

Do not cite any cases or statutes. If you want to include legal arguments or citations, you must do so in a separate memorandum of law. If you intend to allege a number of related claims, number and set forth each separate claim in a *separate paragraph.*

Hereafter defendants are Humphrey, Ewbank, and krinoph, the plaintiff is Roy Heck #874376.

Defendants, Humphrey, Ewbank, and Krinoph wile conducting a search of Richie Heck's trailor home on or about 1/8/86 allowed her relatives to remove items from the trailor. Defendants stated the trailor was a crime scene but did not hold as a crime scene and with defendants permission Rickie Heck's relatives removed items from the trailor, items that are lost forever, items that would have proved the plaintiff Roy Heck innocent of this crime. Defendants engineered this conspiracy to convict the plaintiff of man-slaughter, the destruction of exculpatory evidence is a clear violation of the plaintiffs civil rights.

Defendants, Humphrey, Ewbank, and Krinoph directed in concert with a mutual understanding and agreement an illegal and unlawful voice identification, with a potential state witness, without my or my attorney presence. Defendants stated to potential witness before voice I.D. began that the plaintiff roy Heck's voice was on the tape that the plaintiff was charged with this crime, was in jail, and would be going to trial for this crime, that defendants Krinoph voice was all-so on the tape and he was present at the voice I.D., only two voices played to this witness the defendant and the plaintiff, this again is a clear constitutional violation, this violation occured on or about 6/87, three times and was engineered by the defendants.

Defendants, Humphrey, Ewbank, and Krinoph knowingly destroyed exculpatory evidence. On or about November, 1986 the body of Rickie Heck was discovered, the de-

fendants acting as investigators destroyed or ordered destruction of clothing found with the body, knowing the clothing could not have fit Rickie Heck, and that to continue the investigation would have been favorable to the plaintiff Heck. Defendants all-so destroyed or ordered the destruction of hair that was found with the body, knowing the sample of hair could not have belonged to the deceased or the plaintiffs and would have proved the plaintiff innocent. All of the named defendants had prior knowledge of the wrongs conspired to be done against the plaintiff Heck, the defendants neglected or refused to do anything to prevent the plaintiffs civil rights from being violated.

VI. *RELIEF*

State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes. NOTE TO PRISONERS: If you are a *state* prisoner and seek relief which affects the length or duration of your imprisonment (for example, restoration of good time forfeited, expungement of records, parole-release decision) you *must* file your claim on an appropriate form for actions under 28 U.S.C. § 2254 (application for a writ of Habeas Corpus).

A) A declaratory judgment pursuant to 28 U.S.C.A. 2201-2202, declaring whether or not defendants violated plaintiffs clearly established constitutional Rights not to be subject to an illegal investigation.

B) Compensation in the amount of $300,000.00 from each named defendant for violating plaintiff's civil rights and his losses incurred from his employment and farm operations.

C) Punitive damages in the amount of $300,000.00 from each named defendant for violating plaintiff's civil rights.

D) Insterest and costs incurred in litigating this action if plaintiff should prevail on any of his claims.

E) Attorney fees award if plaintiff prevails on any of his claims

Signed this 16 day of August, 1993.

/s/ Roy Heck #874376
Signature of Plaintiff

AFFIRMATION OF PLAINTIFF

1. I, ROY HECK #874376, the plaintiff in the aforementioned cause, do affirm that I have read all of the statements contained in the complaint and those which are attached in the accompanying financial statement. I believe them to be, to the best of my personal knowledge, true and correct.

2. Moreover, while neither the complaint nor the financial affidavit has been notarized, I do understand that this complaint and these affidavits will become an official part of the United States District Court files and that *ANY* false statements knowingly made by me are illegal and may subject me to criminal penalties.

/s/ Roy Heck #874376
Plaintiff

SUPREME COURT OF THE UNITED STATES

No. 93-6188

ROY HECK,

Petitioner

v.

JAMES HUMPHREY, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

January 14, 1994